In the

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 279

MAGNOLIA PETROLEUM COMPANY,
*Petitioner,*

*v.*

CITIES SERVICE GAS COMPANY, a corporation; and FEDERAL POWER COMMISSION,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT


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# INDEX


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statutes and Regulations Involved | 4 |
| Statement of Case | 4 |
| Reasons for Granting the Writ: | |
| I. The Opinion of the Court of Appeals is in Direct Conflict with the Decisions of the Court of Appeals for the Fifth Circuit on the same Matters of Federal Law | 9 |
| II. A Court of Appeals May Not Pass in Limine on Issues not Before the Administrative Agency and Thereby Exceeded Its Jurisdiction on Review | 11 |
| III. The Court has Prejudged Important Issues in the Administration of the Natural Gas Act not Presented on the Record Before it, but Which are Now Pending Before the Federal Power Commission in Independent Proceedings | 14 |
| IV. The Judgment of the Court of Appeals is Predicated upon a Misconstruction of Important Issues of Federal Law in Conflict with Applicable Decisions of this Court | 16 |
| Conclusion | 26 |

## Index—(Continued)


Page

Appendix "A":

Opinion of the Court Below 29

Appendix "B":

Order Accepting Rate Schedule for Filing 41

Order Modifying Order Accepting Rate Schedule for Filing and Denying Petitions for Rehearing 44

Appendix "C":

18 C. F. R., Chapt. 1, Sections 154.92 and 154.93 47

Appendix "D":

Docket R-168, Notice of Proposed Rulemaking 49

Appendix "E":

Rates and Charges; Schedules; Suspension of New Rates 53

Fixing Rate and Charges; Determination of Cost of Production or Transportation 56

Administration Powers of Commission; Rules, Regulations and Orders 57

Rehearing; Court Review of Orders 57

Appendix "F":

Judgment of the United States Court of Appeals for the 10th Circuit 61

Page

**Cases**

Bethlehem Steel Co. v. New York Labor Rel. Bd., 330 U. S. 767 20

Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371 24

Cities Service Gas Co. v. State Corporation Comm'n of Kansas, 355 U. S. 391 6, 7, 14, 15, 17, 18, 21

Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U. S. 179 18

Colorado Interstate Gas Co. v. F. P. C., 324 U. S. 581 25

F. P. C. v. Hope Natural Gas Co., 320 U. S. 591 22

Guss v. Utah Labor Rel. Bd., 353 U. S. 1 20

Hope Natural Gas Co. v. F. P. C., 134 F. 2d 311 26

Kelly v. Washington, 302 U. S. 1 21

Roy Lee, Trustee v. F. P. C., 236 F. 2d 835, cert. den., 352 U. S. 970 9, 10

Missouri Pacific R. Co. v. Larabee Flour Mills Co., 211 U. S. 612 19

Montana-Dakota Utilities Co. v. Northwestern Public Serv. Comm'n, 341 U. S. 246 25

Northwestern B. T. Co. v. Nebraska State R. Co., 297 U. S. 471 19

Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n, 332 U. S. 507 22

Pennsylvania R. R. Co. v. International Coal Mining Co., 230 U. S. 184 26

Phillips Petroleum Co. v. F. P. C., 227 F. 2d 470, cert. den., 350 U. S. 1005 9, 10, 11

Public Utilities Comm'n v. United Fuel Gas Co., 317 U. S. 456 22

## Citations—(Continued)


| | Page |
|---|---|
| Shank, Trustee v. F. P. C., 236 F. 2d 830, cert. den., 352 U. S. 970 | 9, 10 |
| Southern Pac. Co. v. Arizona, 325 U. S. 761 | 19 |
| Sunray-Midcontinent Oil Co. v. F. P. C., 353 U. S. 944 | 13 |
| Taylor v. Ypsilanti, 105 U. S. 60 | 24 |
| Terminal R. Assoc. v. Brotherhood of Trainmen, 318 U. S. 1 | 19 |
| United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U. S. 332 | 24 |
| H. P. Welch Co. v. New Hampshire, 306 U. S. 79 | 19 |


### Statutes and Regulations


| | |
|---|---|
| Federal Power Commission Order No. 174 | 4, 22 |
| Sec. 154.92 | 10, 12 |
| Sec. 154.93 | 10, 12 |
| Natural Gas Act of June 21, 1938, 52 Stat. 821, as amended, 15 U. S. C. 717, et seq.: | |
| Sec. 4 | 6 |
| Sec. 4(c) | 6, 10, 11, 12, 24 |
| Sec. 4(e) | 24 |
| Sec. 16 | 6, 21 |
| Sec. 19(b) | 5, 6, 9, 10, 13 |

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on May 14, 1958.

## OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported but is printed as Appendix "A" hereto, *infra*, pp. 29-40. The orders of the Federal Power Commission (R. 186-188; and R. 200-201) which formed the basis for this action are

printed in chronological order in Appendix "B" hereto, *infra*, pp. 41-47.

## JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1958. A petition for rehearing was timely filed on May 29, 1958. An order denying the petition for rehearing was first entered on June 10, 1958; an order vacating the order denying petition for rehearing and reinstating petition for rehearing was entered on June 19, 1958; and the petition for rehearing was denied on July 15, 1958.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the specific procedures and conditions prescribed by the Congress in Section 19(b) of the Natural Gas Act, under which judicial review of Federal Power Commission orders may be had, permit a court of appeals to review administrative action by the Commission with respect to initial gas rate schedules filed in compliance with Section 4(c) of the Act where the petitioner is before the court without a record, without a single established fact or finding, and without evidence?

2. Whether a court of appeals in the exercise of its power of review pursuant to Section 19(b) of the Natural Gas Act has jurisdiction to pass upon questions of far reaching public import which were not at issue in the proceedings before the Federal Power Commission?

3. Whether a court of appeals in the exercise of its power to review a specific administrative order pursuant to Section 19(b) of the Natural Gas Act, exceeded its jurisdiction and usurped the administrative function when it passed upon important questions in the administration of the Natural Gas Act; such questions first arising between the time the appeal was perfected and opinion rendered, during which interval the administrative agency charged with the enforcement of the Act has asserted original primary jurisdiction over such questions pursuant to the authority granted to the Federal Power Commission by Sections 4 and 16 of the Natural Gas Act?

4. Did the Court of Appeals exceed its jurisdiction and deprive the petitioner of due process of law when in the course of its statutory review of administrative action, it directed the expunging of a portion of a rate schedule without granting the parties an opportunity to assert their claims and defenses in respect thereto, or opportunity for the Commission to pass upon such contentions?

5. Whether gas rate schedules which were in effect and being paid on June 7, 1954 and which were filed with and accepted by the Federal Power Commission in accordance with Section 4(c) of the Natural Gas Act and the Commission's implementing rules and regulations thereunder, and which rate schedules were based in part upon the gas minimum price order of Kansas, were ipso facto and retrospectively invalidated by this Court's opinion of January 20, 1958 declaring the minimum price order of Kansas invalid?

## STATUTES AND REGULATIONS INVOLVED

*52 Stat. 822, 15 U. S. C. 717c;*

*52 Stat. 823, 15 U. S. C. 717d(a);*

*52 Stat. 830, 15 U. S. C. 717o;*

*52 Stat. 831, 15 U. S. C. 717r;*

*18 C. F. R., Chap. I, Sections 154.92, 154.93;*

*Notice of Proposed Rule Making, FPC Docket No. R-168, 23 F. R. 2972 (May 2, 1958).*

## STATEMENT OF THE CASE

On June 17, 1946, Petitioner entered into a contract with respondent Cities Service Gas Company for the sale and purchase of gas produced by petitioner from the Hugoton Gas Field of Kansas (R. 19-46).

Effective on and after January 1, 1954 the State Corporation Commission of Kansas fixed a minimum price of 11 cents per Mcf as a condition precedent to the withdrawal of gas from the Hugoton Gas Field of Kansas (R. 118-130). Cities Service commenced to pay in accordance with this minimum price order.

On July 16, 1954, the Federal Power Commission issued regulations (Order No. 174 as superseded by Order No. 174-A and No. 174-B) which required petitioner to file its initial gas rate schedules setting forth petitioner's rates and charges retrospectively effective on June 7, 1954, (App. "C" Infra, pp. 47-48). Conformable thereto, petitioner filed its basic contract with Cities Service Gas Company

covering sales of gas produced from Hugoton Field and all supplements or agreements amendatory thereof, which were effective and applicable on and after June 7, 1954, including, as required by the Commission's regulations, the Kansas minimum price order that became effective January 1, 1954, and which was in full force and effect on the critical June 7, 1954 date (R. 118-130). The Federal Power Commission accepted petitioner's gas rate schedules for filing purposes (R. 186-188; and R. 200-201, also appearing as Appendix "B"), including the Kansas minimum price order which at that time had been upheld by the Kansas Supreme Court, the highest judicial body that had then considered the precise question involved.

Protesting, Cities Service Gas Company petitioned the Court of Appeals for the Tenth Circuit to review the action of the Federal Power Commission in accepting petitioner's initial gas rate schedule for filing purposes. The Court of Appeals permitted this petitioner to intervene and on August 28, 1957 the Commission certified and filed with the Court a transcript of the record upon which the order complained of was entered, as provided by Section 19(b) of the Natural Gas Act. (Appendix "E", infra, pp. 58-59.)

Based upon the record as it was presented for review by the Court of Appeals on August 28, 1957, petitioner filed a motion to dismiss on the grounds, *inter alia*, that the Court was without jurisdiction to entertain the appeal in that the order sought to be reviewed was procedural and interlocutory, and not subject to review within the limita-

tions of Section 19(b) of the Act. On November 15, 1957, the Court denied the motion to dismiss without prejudice.

In that posture of the case, between certification of the record and rendition of judgment, supervening events raised new issues neither passed upon by the Federal Power Commission in its administrative proceedings, nor properly before the Court for consideration at the time appeal was perfected. In a per curiam opinion rendered January 20, 1958 this Court reversed the judgment of the Supreme Court of Kansas sustaining the validity of the Kansas Minimum Price Order, *Cities Service Gas Company v. State Corporation Commission of Kansas, 355 U. S. 391*; and thereupon, the Federal Power Commission on April 28, 1958 instituted proceedings pursuant to the authority granted it by Sections 4 and 16 of the Natural Gas Act *(15 U. S. C. §§ 717c, 717o)* (Appendix "E", infra, pp. 53-57) to determine uniform national policy and interpretations in the administration of the Natural Gas Act as affected by this Court's decisions. A complete copy of the notice of proposed rule making instituting proceedings in FPC Docket R-168, 23 F. R. 2973 (1958) appears as Appendix "D", infra, pp. 49-52.

In its opinion herein the Court of Appeals recognized that the action of the Federal Power Commission under review was taken pursuant to Section 4(c) of the Natural Gas Act and the pertinent regulations, that such action was proper at the time it was taken, and that no hearing had ever been held to determine the propriety of the filed rate. Nevertheless the Court held that Section 19(b) of the

Natural Gas Act does not by its terms limit the review of the orders of the Commission to those which are final in form and substance, and that the administrative action accepting an initial gas rate schedule for filing purposes involved here constituted a reviewable order.

The Court of Appeals then proceeded de hors the record and the opinions of this Court to hold that the minimum price order of Kansas was not only invalid from and after the supervening decision by this Court on January 20, 1958 in the case of *Cities Service Gas Company*, *supra*, or from, July 16, 1954 when the incident of federal regulation was first imposed upon producers of natural gas, but that the minimum price order of Kansas was void *ab initio* and therefore inoperative on June 7, 1954, conferred no rights and imposed no duties, and hence offered no basis for the challenged rate filing. Even though the Commission had not theretofore had an opportunity to consider and pass upon the important questions affecting the proper administration of the Act raised after the instant case had been certified to the Court of Appeals, but did have such questions pending before it in independent proceedings instituted *sua sponte* prior to the time the Court rendered its opinion; nevertheless, the Court here refused to dismiss or to remand the case to the Commission where a proper record could be made and the issues could be presented, argued, and passed upon, but rather, the Court set aside the order of the Commission accepting petitioner's rate schedule for filing purposes and ordered the Commission to expunge such filing from its files.

It is petitioner's position that the Court of Appeals committed fundamental error when it accepted jurisdiction to review a mere procedural order, and, having accepted such jurisdiction, compounded its error by going outside the record to raise, and decide, new issues which were not before it at the time appeal was perfected. The power of the Court of Appeals in reviewing the orders of the Federal Power Commission was exhausted when it found that the Commission acted properly at the time it issued the orders under review (Appendix "A", footnote, p. 32).

Considerations of questions as what effect the principles of "supervening illegality" brought about by a change in judicial decision, as modified by the "operative fact doctrine," might have upon rate schedule filings lawful when made and accepted by the Commission for filing purposes, or upon the "filed rate doctrine," or the effects of acquiescence, voluntary payments or estoppel, must await a proper case for determination, where the parties may present by pleadings and proof their defenses or affirmative claims, a record made, and an opportunity for the lower tribunal to pass upon rights of the parties relying upon the same. An appellate court has no jurisdiction to decide these matters *in limine* in the course of proceedings to review mere procedural orders issued pro forma by the Federal Power Commission.

It is further the position of this petitioner that the Court of Appeals' de novo holding of absolute retroactive invalidity was erroneous as a matter of substantive law, even

if it be conceded *arguendo* that the Court had jurisdiction to consider these matters in an appeal instituted pursuant to Section 19(b) of the Natural Gas Act

## REASONS FOR GRANTING THE WRIT

### I.

### The Opinion of the Court of Appeals is in Direct Conflict with the Decisions of the Court of Appeals for the Fifth Circuit on the Same Matters of Federal Law

The decision of the court below in the instant case and in *Phillips Petroleum Company v. Federal Power Commission, 227 F. 2d 470, cert. den. 350 U. S. 1005* upon the authority of which the court found jurisdiction to decide the instant case, are directly and irreconcilably in conflict with the decisions of the United States Court of Appeals for the Fifth Circuit in *Roy Lee, Trustee v. Federal Power Commission, 236 F. 2d 835, cert. den. 352 U. S. 970.* and *Shank, Trustee v. Federal Power Commission, 236 F. 2d 830, cert. den. 352 U. S. 970.* The conflict between these Fifth Circuit cases and the Tenth Circuit's cases (first pointed out by Judge John R. Brown, dissenting in the *Lee* and *Shank* cases, *236 F. 2d at page 809*), involve the same matter of federal law under parallel circumstances of fact, *i. e.*, whether Section 19(b) of the Natural Gas Act confers jurisdiction upon the United States Courts of Appeals to review administrative action by the Federal Power Commission, with respect to initial gas rate schedules filed in

compliance with Section 4(c) of the Natural Gas Act. The Fifth Circuit found that it did not have such jurisdiction. The Tenth Circuit in the instant case found that it does have such jurisdiction.

In *Roy Lee, Trustee v. Federal Power Commission, supra*, as in this case, the producer of natural gas filed with the Commission an initial rate schedule pursuant to Section 4(c) of the Natural Gas Act and the implementing sections of the Commission's Order 174 (18 C. F. R. 154.92 and 154.93), applicable to independent producers. In the *Lee* case the Commission rejected the initial rate filing; in this case the Commission accepted the initial rate filing. There, as here, petitioner invoked the jurisdiction of the court under Section 19(b) of the Natural Gas Act. The Court of Appeals for the Fifth Circuit dismissed Lee's petition for review for lack of jurisdiction, citing the legal principles involved in *Shank v. Federal Power Commission, supra*. Here the court of Appeals for the Tenth Circuit accepted jurisdiction, citing *Phillips Petroleum Company v. Federal Power Commission, supra*.

In the *Shank* case (p. 834), the Fifth Circuit squarely held that Section 19(b) of the Natural Gas Act "* * * contemplates a review by this Court of definitive orders entered after hearing and upon completion of the administrative process, and * * * applying this test to the issues presented, we think it plain that these orders [by the Federal Power Commission] are in no proper sense definitive orders as contemplated by Section 19(b), but they are instead mere procedural steps taken at the inception of and

not upon the completion of the administrative process. * * * The petitioner is thus before this Court without a record, without a single established fact or finding, and without evidence, asking us to exercise our power of review when, in fact, there is no 'order' to review."

In the instant case (Appendix "A", pp 33-34) the Tenth Circuit squarely held that "* * * Section 19(b) of the Natural Gas Act does not by its terms limit the review of orders of the Commission to those which are final in form and substance" and "the present case is comparable to that considered by us in *Phillips, supra*, wherein we stated: 'The orders sought to be reviewed here do not deal with the merits of the proceedings before the Commission in the sense that they were entered upon evidence concerning the reasonableness of the rates. They do not purport to finally determine Phillips' wholesale rates. The matter is left to a conventional hearing in these proceedings. But the orders do purport to establish with finality the wholesale rates which Phillips was authorized to charge Michigan on June 7, 1954 and thereafter until changed by order of the Commission pursuant to hearing'.".

## II.

## The Court of Appeals Erred in Passing In Limine on Issues Not Before the Administrative Agency and Thereby Exceeded Its Jurisdiction on Review

Section 4(c) of the Natural Gas Act prescribes that every natural gas company shall file rate schedules with the Commission, under such rules and regulations as the

Commission may prescribe, and in such form as the Commission may designate. The Commission's rules and regulations (18 C. F. R. 154.92 and 154.93) prescribe that independent producers of gas shall file with the Commission rate schedules setting forth the terms and conditions of service and all rates and charges for such sale retrospectively effective on June 7, 1954. Petitioner did so, and the Commission accepted such rate schedules for filing purposes. This is the record.

At the administrative level, Cities Service Gas Company protested the Commission's action in accepting these rate schedules for filing purposes (R. 188-195). Although there was no hearing on the matter, no record made, no single established fact or finding made and no evidence taken, the Commission accepted the rate schedule as filed pursuant to the provisions of Section 4(c) of the Natural Gas Act, *15 U. S. C. 717c(c)* and the pertinent regulations, 18 C. F. R. 154.92 and 154.93 (R. 186-188; and 200-201). Having found that Magnolia's filing complied with all the formal requirements of the Act and the Commission's rules and regulations at the time it was filed, the Commission, as a matter of law, had no alternative but to accept the filing, and all further inquiry was at an end so far as this record is concerned.

Similarly, when this record was certified to the Court of Appeals, it also found that the Commission accepted the rate schedule as filed pursuant to the provisions of Secton 4(c) of the Act and the pertinent regulations (Ap-

pendix "A", p. 30), and that the Commission was acting properly at the time it took the action being reviewed (Appendix "A", footnote, p. 32). The other matters discussed in the Court's opinion were neither before the Commission, a part of the record being reviewed, nor properly before the Court of Appeals. The power of the Court of Appeals under Section 19(b) of the Natural Gas Act to review the action of the Federal Power Commission was exhausted when it found that the Commission had not abused its administrative discretion, *Sunray Mid-Continent Oil Company v. Federal Power Commission, 353 U. S. 944 (1957).*

The order of the Court of Appeals directing the Commission to strike Supplement No. 26 to Petitioner's rate schedule from its files was beyond the jurisdiction of the Court. Assuming, arguendo, that the Court was correct in holding that the minimum price order of Kansas was invalid *ab initio*, this Petitioner was thereby deprived of all opportunity to present its claims and contentions that said minimum price order had become a part of its contract by reason of voluntary payment, acquiescence, and estoppel, or by other actions of the parties to the contract. Certainly this Petitioner should not be deprived of its day in court or the opportunity to present any such defenses that it may have. The order of the Court summarily directing the expunging of Supplement No. 26 to Petitioner's rate schedule would deny it an opportunity to present these defenses before the Commission. In no event should the Court have done more than remand the case to the Com-

mission for further consideration on the merits of the proper rate in effect on June 7, 1954 in view of the supervening invalidity of the minimum price order of Kansas.

## III.

## The Court Has Prejudged Important Issues in the Administration of the Natural Gas Act Not Presented on the Record Before It, but Which Are Now Pending Before the Federal Power Commission in Independent Proceedings

In order to reach its conclusion setting aside the order of the Commission accepting petitioner's filed rate and directing the Commission to strike Supplement No. 26 from its files, it was necessary for the Court of Appeals to premise its opinion in this case on the bald assumption that the Court's supervening decision of January 20, 1958 in the *Cities Service Gas Company v. Kansas Corporation Commission, supra*, ipso facto and retrospectively invalidated rate schedule filings, including petitioner's, on file with the Federal Power Commission which were based in part upon the minimum price order of Kansas (Appendix "A" p. 38).

The assumption made in this case by the Court of Appeals that the Kansas order was "void *ab initio*" was not only without warrant in the record and patently erroneous as a matter of substantive law (as hereinafter demonstrated), but such assumption could only be reached after determining at the threshold the following important questions in the administration of the Natural Gas Act:

(1) Whether any rate filing predicated solely upon a state minimum price order which has been declared invalid by the United States Supreme Court:

(a) must now be regarded as having been invalid from the date of filing; or,

(b) must now be regarded as having become invalid upon the issuance on January 20, 1958 of the decision of the Supreme Court in *Cities Service Gas Company v. State Corporation Commission of Kansas, 355 U. S. 391*, or on March 12, 1958 when the mandate of the Supreme Court was issued in that case; or,

(c) must now be regarded as having become invalid on the happening of some other event; or,

(d) must be regarded as still effective;

i. by reason of failure of the purchaser thereunder to protest the filing; or,

ii. by reason of an agreement, expressed or implied, to pay the filed rate;

iii. by reason of legal estoppel against a protest by a purchaser thereunder; or,

iv. for any other reason.

These are serious questions affecting a broad and important segment of the nation's economy, whose initial determination is for the agency charged with the administration of the Natural Gas Act. These questions were not before the Federal Power Commission at the time it issued its challenged orders, and these questions were not before the Court of Appeals in the course of its review of the Commission's administrative actions below, which were conceded to have been correct when taken. On the contrary, these very questions were pending before the Fed-

eral Power Commission at the time the Court of Appeals rendered its decision, as evidenced by the "Notice of Proposed Rule Making" issued by the Commission on April 28, 1958, in Docket No. R-168, 23 F. R. 2973 (Appendix "D", pp. 49-52, infra).

It is respectfully submitted that the Court of Appeals determined these important national matters in a judicial vacuum, without benefit of a record, evidence, briefs, or opportunity for the parties affected thereby to reply thereto and present defenses, affirmative pleas and claims, or opportunity for any lower tribunal to pass upon and determine what effect the supervening invalidity of the Kansas price orders might have upon the rights of the parties who relied upon the same.

If this decision is permitted to stand, the administrative agency charged with the primary responsibility for determining national policy in the administration of the Natural Gas Act will be forced to stand aside helplessly and watch the established regulatory procedures crumble in a mass of litigation over issues which were never properly before the Court of Appeals in the first instance.

## IV.

## The Judgment of the Court of Appeals Is Predicated Upon a Misconstruction of Important Issues of Federal Law in Conflict with Applicable Decisions of This Court

### 1. The Decision of the Court Below Constitutes an Unwarranted Expansion of this Court's De-

cision in *Cities Service Gas Company v. State Corporation Commission of Kansas*, 355 U. S. 391 (January 20, 1958.)

In determining that the lawful rate in effect on June 7, 1954, for gas sold by petitioner to Cities Service Gas Company to be "the contract rate effective on June 7, 1954" unaffected by the Kansas minimum price law, the Court of Appeals assumed that the mere enactment of the Natural Gas Act in 1938 prevented the State of Kansas from subsequently regulating the minimum price for gas taken from the Hugoton Field despite the fact that the federal authority lay "dormant and unexercised prior to July 16, 1954" when the Federal Power Commission first imposed federal regulation over the class of persons designated as "independent producers" of natural gas. Inherent in this assumption is a limitation upon the power of a state to enter an order concededly necessary in the interest of conservation, prevention of waste and protection of correlative rights in a natural gas reservoir, even though the Federal Power Commission had made no attempt to regulate these matters. The court below based its assumption upon the supervening decision of this Court in *Cities Service Gas Company v. State Corporation Commission of Kansas, supra*, and erroneously relied upon that decision as determining that the Kansas minimum price law was invalid from its inception. This was an unwarranted expansion of this Court's decision, as this Court has a long standing rule that it will not pass upon questions which are not presented in the proceeding before the court. For

example, this Court in *Cities Service Gas Company v. Peerless Oil and Gas Company, 340 U. S. 179 (1950)*, sustained the constitutional authority of a state to pass minimum gas price regulations, but refused to consider the effect of the Natural Gas Act on such state minimum price regulations. Correlatively, this Court determined in *Cities Service Gas Company v. State Corporation Commission of Kansas, supra*, that a state minimum price order was invalid *when* it conflicts with federal regulation under the Natural Gas Act, but did not say at what point in time such conflict occurred. There was no attempt to determine the retroactive invalidity of the Kansas order and, indeed, that issue was not before the Court for decision, and was not urged in the arguments or briefs presented to the Court.

The composite effect of the *Cities Service Gas Company v. State Corporation Commission of Kansas decision* was to vitiate the Kansas minimum price law, because federal jurisdiction had been implemented by the Series 174 orders promulgated by the Federal Power Commission on July 16, 1954, and thus, *at that time*, the theretofore valid state regulations were superseded. Thus, when the court below stated "When the United States Supreme Court struck down the Kansas order [January 20, 1958], there was no longer [on June 7, 1954] a valid order which could modify the contract rate, and the contract rate was the rate in effect on June 7, 1954," the Court of Appeals places an erroneous construction upon the *Cities Service Gas Company v. State Corporation Commisson of Kansas* case, and

as set out below, which has resulted in a decision in conflict with the applicable decisions of this Court.

2. The Decision of the Court of Appeals Conflicts with the Applicable Decisions of this Court which Sustain the Validity of State Regulatory Action "Where Federal Power has been Delegated but Lies Dormant and Unexercised."

The assumption by the court below that the mere existence of the Natural Gas Act made the Kansas minimum price order void *ab initio*, disregards and ignores the decisions of this Court which firmly establish that merely because Congress has vested regulatory power in a federal agency, that does not of itself displace state regulations if no federal standards are set. *H. P. Welch Co. v. New Hampshire, 306 U. S. 79 (1939); Southern Pacific Co. v. Arizona, 325 U. S. 761 (1945); Terminal R. Assoc. v. Brotherhood of Trainmen, 318 U. S. 1 (1942); Northwestern B. T. Co. v. Nebraska State R. Co., 297 U. S. 471 (1936); Missouri P. R. Co. v. Larabee Flour Mills Co., 211 U. S. 612 (1909).* This fundamental principle underlying the demarcation between federal and state authority was cogently summarized in *Missouri P. R. Co. v. Larabee Flour Mills Co., supra*, where the Court stated (p. 623):

> "On the other hand, it is said that Congress has already acted, has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. But the fact that Congress has entrusted power to that commission does not, in the absence of action by it, change the rule which existed prior to the creation of the commission. * * * In

other words, the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself, and in the absence of action by the commission, interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens."

The guiding principles for determining whether federal regulation supersedes state regulation were clearly stated by this Court in *Bethlehem Steel Co. v. New York Labor Rel. Bd., 330 U. S. 767 (1947)*. Ultimately, in each case, the effect of federal legislation on state regulation is a matter of congressional intent as derived from the statute itself, its primary purpose and the judicial construction that has been placed thereon. *Guss v. Utah L. R. B., 353 U. S. 1 (1957)*. In the *Guss* case, this Court was confronted with a problem very similar to the one which is presented here, and in determining that Congress preempted the field by merely enacting the National Labor Relations Act, the Court made the following statement:

"'Our reading of Section 10(a) forecloses the argument based upon such cases as *H. P. Welch Co. v. New Hampshire, 306 U. S. 79, 83 L. Ed. 500, 59 S. Ct. 438*, and *Missouri P. R. Co. v. Larabee Flour Mills Co., 211 U. S. 612, 53 L. Ed. 352, 29 S. Ct. 214*, that "where federal power has been delegated but lies dormant and unexercised," *Bethlehem Steel Co. v. New York State Labor Relations Board*, supra *(330 U.S. at 775)*, the states' power to act with respect to matters of local concern is not 'necessarily superseded. *But in each case the question is one of congressional intent.* Compare *H. P. Welch Co. v. New Hampshire (U. S.)*, supra, with *Napier v. Atlantic Coastline R. Co., 272 U. S. 604, 71 L. Ed. 432, 47 S. Ct. 207*'." (Emphasis supplied.)

Therefore, the crucial inquiry in this proceeding, and one which the court below failed to determine because of its erroneous interpretation of the *Cities Service Gas Company v. State Corporation Commission of Kansas* case, is whether, by the enactment of the Natural Gas Act, Congress intended to curtail state power prior to the implementation of the paramount federal authority provided therein.

The principle is thoroughly established that state police power, otherwise valid, is superseded by federal action only where the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together. *Kelly v. Washington, 302 U. S. 1 (1937)*, and cases cited therein. Here, Section 16 of the Natural Gas Act grants the Federal Power Commission the power to issue, make, amend and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of the Act, and further specifically provides that:

> "Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after the publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe."

And, as evidenced by many decisions of this Court, the fundamental congressional purpose underlying the Natural Gas Act was to complement and supplement, insofar as possible, the existing state jurisdiction over matters of

local concern. *Public Utilities Com. v. United Fuel Gas Co.*, 317 U. S. 456 (1943); *Federal Power Com. v. Hope Nat. Gas Co.*, 320 U. S. 591 (1944); *Panhandle E. Pipeline Co. v. Public Serv. Com.*, 332 U. S. 507 (1947). When this underlying purpose is considered in conjunction with Section 16 of the Act, it shows that Congress did not intend to supersede or preclude state regulation over matters of local concern, such as the Kansas minimum price laws until the paramount federal authority over such matters has been exercised by the Commission.

By its own rules, the Commission's orders did not become effective until the date prescribed therein. The Commission first implemented its jurisdiction by the issuance of Order No. 174 on July 16, 1954. Prior to that time the Kansas minimum price laws constituted valid state regulations, and therefore, on June 7, 1954, the Kansas minimum price law was a valid and subsisting state regulation which, by the terms of the contract between petitioner and Cities Service, modified the contract. Accordingly, the contract rate on that date was 11 cents, and the court below erred in overruling the Commission's acceptance of the filing of that rate and in ordering Supplement No. 26 of petitioner's rate schedule stricken from the rate schedule, although such filing was lawful when made. Because this error is based upon an erroneous interpretation of a decision of this Court, involves important federal questions and has a widespread effect, it necessitates correction by the Court by Writ of Certiorari.

### 3. The Decision of the Court of Appeals Conflicts with the Applicable Decisions of this Court which Prohibit a change in Judicial Decision from Being Applied Retroactively in Derogation of Prior Vested Rights.

Under the contract between petitioner and Cities Service Gas Company, the parties agreed:

> "All of the provisions of the contract are subject to all legislation, State or Federal, with respect to the subject matter hereof, and to all present or future gas proration and other applicable orders, rules and regulations of duly constituted authorities having jurisdiction unless the same shall be declared or held, with finality, to be invalid or ineffective with respect thereto * * *." (R. 39.)

The Court of Appeals held: "When the United States Supreme Court struck down the Kansas order, there was no longer a valid order which could modify the contract rate, and the contract rate was the rate effective on June 7, 1954" (Appendix "A", p. 38).

This is a conclusion which can only be supported by an all-inclusive statement of a principle of absolute retroactive invalidity which cannot be justified in this case. The Kansas order was actually in existence prior to the critical June 7, 1954 date; the parties relied upon such order; consumers, royalty owners and distributors relied upon it; the Kansas Corporation Commission relied upon such order, and the Federal Power Commission itself relied upon such

order. These are operative facts having far reaching consequences which cannot justly be ignored, contrary to the applicable decisions of this Court in *Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371 (1940)*, and the collated cases discussed in *Taylor v. Ypsilanti, 105 U. S. 60*, which long ago settled that:

> "* * * the true rule is to give a change of judicial construction in respect to a statute the same operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, *make it prospective, but not retroactive.* After a statute has been settled by judicial construction, the construction becomes, as far as contract rights acquired under it are concerned, as much a part of the statute as the text itself; and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment. * * *." (Emphasis supplied.)

**4. The Decision of the Court of Appeals Conflicts With the Applicable Decisions of this Court Establishing the Single Lawful Filed Rate Doctrine.**

It should be noted that this Court's opinion in *United Gas Pipe Line Co. v. Mobile Gas Service Corporation, 350 U. S. 332*, involved a change in rates filed pursuant to Section 4(e) of the Natural Gas Act which was *invalid* when made, and has no application to the present case which involves an initial rate schedule filing required by the Federal Power Commission pursuant to Section 4(c) of the Natural Gas Act, and which was actually *valid* at the time

it was made, subject, of course, to the Commission's continuing supervision.

The Court of Appeals' direction to the Federal Power Commission to strike a portion of petitioner's filed and accepted rate (Appendix "A", p. 39) is directly contrary to the applicable decisions of this Court in *Montana-Dakota Utilities Company v. Northwestern Public Service Commission (1950)*, *341 U. S. 246*, where this Court acknowledges the sanctity of a rate filed with the Commission, even in the face of a charge that such rate would be found to be fraudulent if the parties were permitted to go behind such filed rate; *a fortiori*, in this case where the Federal Power Commission ordered the petitioner to file the Kansas minimum price order, which had been upheld by the Supreme Court of Kansas, the highest judicial body that had then considered the precise question involved. In the *Montana-Dakota* case, *supra*, this Court held:

> "It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.
>
> "We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable."

Other cases to the same effect are: *Colorado Interstate Gas Co. v. Federal Power Commission*, *324 U. S. 581*; *Hope*

*Natural Gas Co. v. Federal Power Commission, 134 F. 2d 287, 311 (reversed on other grounds, 320 U. S. 591); Pennsylvania R. R. Co. v. International Coal Mining Co., 230 U. S. 184.* On the basis of the foregoing authorities and others, it is established law that not only is a seller bound to recognize rates filed and accepted by a regulatory commission, but also a purchaser is bound to recognize those rates. The attempt to disregard portions of rate schedules on file with the Federal Power Commission which originated with state minimum price orders, valid when they were issued and until superseded by the commencement of federal regulation, is a complete violation of the principle of the single lawful filed rate.

## CONCLUSION

Because of the direct conflict between courts of appeal on a matter of federal law; because the judgment and opinion below might seriously hinder future administration of the law which impinges on the delicate areas of Federal-State relations; because of the conflict between the lower court's all inclusive statement of a principle of absolute retroactive invalidity and this Court's decisions that supervening illegality by change of judicial construction can be made prospective, but not retroactive; and because of the importance of this case to the entire natural gas industry, consumer interests, and the Federal Power Com-

mission alike, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDICES

## APPENDIX "A"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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No. 5666

CITIES SERVICE GAS COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
MAGNOLIA PETROLEUM COMPANY,
INTERVENOR

---

Petition to Review Order of
the Federal Power Commission

---

Decided May 14, 1958

Before PICKETT, LEWIS AND BREITENSTEIN, Circuit Judges.

### OPINION OF THE COURT

LEWIS, Circuit Judge.

The petitioner, Cities Service Gas Company, seeks to review and thereupon to set aside an order of the Federal Power Commission issued March 21, 1957, as modified May 17, 1957, accepting for filing a rate schedule sub-

mitted by the intervenor, Magnolia Petroleum Co. Authority for review is found in Section 19 (b) of the Natural Gas Act, 15 U.S.C.A. 717r (b).

The Commission accepted the rate schedule as filed pursuant to the provisions of Section 4 (c) of the Natural Gas Act, 15 U.S.C.A. 717c (c) and the pertinent regulations, 18 C. F. R. 154.92 (a) and 154.93. The filing included a gas purchase contract entered and executed by petitioner and Magnolia on June 17, 1946, which provided for a sale of gas at a basic six cents per Mcf 16.4 p.s.i.a., and an order of the Kansas Corporation Commission, effective January 1, 1954, which set an eleven-cent minimum price, 14.65 p.s.i.a., on gas produced from the field covered by the contract. The Commission order was filed as Supplement 26. At such time petitioner had unsuccessfully attacked the authority of Kansas to regulate rates upon gas purchased for resale in interstate commerce, Cities Service Gas Co. v. Kansas Corporation Commission, 180 Kan. 454, 304 P. 2d 528, *but the subsequent reversal of the Kansas holding by the United States Supreme Court*, 355 U. S. 391, 78 S. Ct. 381, 2 L. Ed. 2d 355, *premises petitioner's* present contentions. In harmony with the earlier holdings of Phillips Petroleum Co. v. Wisconsin, 347 U. S. 672, 74 S. Ct. 794, 98 L. Ed. 1035, and Natural Gas Pipeline Co. of America v. Panoma Corp., 349 U. S. 44, 75 S. Ct. 576, 99 L. Ed. 866, the U. S. Supreme Court found the Kansas Corporation Commission without authority to set rates upon the gas herein involved. The eleven-cent rate as evidenced by Supplement 26 was thus determined to be an invalid compulsion upon petitioner and Magnolia.

Since the issuance of the Kansas Corporation Commission order of January 1, 1954, petitioner has paid the eleven-cent rate under protest and in furtherance of its protest instituted an action against Magnolia in the U. S. District Court for the District of Kansas in which a determination of contract rights was sought. Pursuant to an order of that court, payments since July 22, 1955, have been made into court and the court has paid over to Magnolia amounts equal to the six-cent contract price and has impounded the remainder of the eleven-cent payment. The District Court action is still pending.

Magnolia's tendered rate schedule was accepted for filing by the Federal Power Commission on March 21, 1957, with recognition of the parties' existing controversy worded "subject, however to the express condition that such acceptance is without prejudice to any claims or contentions which have been made by or for Magnolia Petroleum Company or by or for Cities Service Gas Company in pending litigation concerning this particular sale of gas." Both companies petitioned for rehearing and clarification and the Power Commission then issued its order of May 17, 1957, "Modifying Order Accepting Rate Schedule for Filing and Denying Petitions for Rehearing." The modification to the original order was the removal of the condition set out above. Petitioner's further efforts for rehearing were rejected because "there is no provision under the Natural Gas Act nor in the Commission's rules for applications for rehearing of orders denying rehearing."

In support of review, petitioner now urges that the Power Commission erred in accepting the eleven cent state-ordered minimum price as the rate to be paid by petitioner on and after June 7, 1954,[1] that the decision in Cities Service Gas Co. v. Kansas Corporation Commission, supra, rendered the order of that commission void ab initio; and that this court should adjudicate the contract price and effective rate as of June 7, 1954 to be six cents. The respondent Commission answers that the accepance of a rate schedule for filing is not a determination by the Commission as to the validity or reasonableness of the rate and that the order complained of was merely procedural and interlocutory and not subject to review; the Commission concedes that petitioner should recover, in a proper action, any excess payments but contends that the Kansas order is and always has been but a nullity in the filing and cannot be the basis for any relief to petitioner. Magnolia urges that the Commission order is but interlocutory and not reviewable and that petitioner is not aggrieved and has not exhausted the administrative remedies; and pointing out that the eleven-cent rate was the actual amount paid on June 7, 1954, asserts that there is no error in the orders of the Power Commission.

[1] Petitioner argues here that the Kansas Corporation Commission order, in view of earlier decisions of the U. S. Supreme Court was so patently invalid that the Federal Power Commission erred in giving any cognizance to the order and should have rejected it when filed by Magnolia. We reject that argument. On the pertinent date, June 7, 1954, the authority of the Kansas Commission had been upheld by the Kansas Supreme Court, the highest judicial body that had then considered the precise question involved. It was not the function of the Federal Power Commission to pass upon the question of whether or not the Kansas Supreme Court was in error. Good administrative policy dictates otherwise. The inherent difficulties that may arise from a later change in judicial interpretation are not attributable to administrative fault. Our books of law carry many cases requiring reversal of a lower court by reason of a change occurring between trial and appeal.

We consider first the jurisdictional aspects of the review sought.

As was recognized in Phillips Petroleum Co. v. Federal Power Commission (10 Cir.) 227 F. 2d 470, cert. den. 350 U. S. 1005, Section 19 (b) of the Natural Gas Act does not by its terms limit the review of orders of the Commission to those which are final in form and substance. But it is entirely proper, in order to keep in proper perspective the duties and powers of administrative bodies with respect to their specialized fields, for courts to avoid conflicts by refusing to interfere in matters yet within the consideration of the Commission. Thus it has been held that an order of the Commission is not reviewable unless there has been an application to the Commission for rehearing; nor is an order granting a rehearing subject to review. Federal Power Commission v. Metropolitan Edison Co., et al., 304 U. S. 375, 58 S. Ct. 963, 82 L. Ed. 1408. It is there said:

> "The statute contemplates a case in which the Commission has taken evidence and made findings. Its findings, if supported by evidence, are to be conclusive * * *. The provision for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case."

Such language must be read in relation to the facts of the case and, so limited, does not establish an inflexible standard requiring a conventional hearing and resulting in findings supported by evidence as a condition to review. Otherwise, the procedure for review could be successfully

circumvented by a refusal to act upon a statutorily granted right. Pacific Power & Light Co., et al., v. Federal Power Commission (9 Cir.) 98 F. 2d 835. An order of an administrative body is reviewable when action taken in advance of hearings or adjudication result in the setting of legal consequences, Columbia Broadcasting System v. United States, 316 U. S. 407, 62 S. Ct. 1194, 86 L. Ed. 1563. The order of the agency is final for purposes of review when it imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process, Isbrandtsen Co. v. United States (C.A. D.C.) 211 F. 2d 51, cert. den., 347 U. S. 990, and cases cited therein.

The present case is comparable to that considered by us in Phillips, supra, wherein we stated:

> "The orders sought to be reviewed here do not deal with the merits of the proceedings before the Commission in the sense that they were entered upon evidence concerning the reasonable ess of the rates. They do not purport to finally determine Phillips' wholesale rates. The matter is left to a conventional hearing in these proceedings. But the orders do purport to establish with finality the wholesale rates which Phillips was authorized to charge Michigan on June 7, 1954 and thereafter until changed by order of the Commission pursuant to hearing."

Also similar in impact to the case at bar is the order accepting a new schedule filed by a natural gas company in United Gas Pipe Line Co. v. Mobile Gas Service Corp., et al., 350 U. S. 332, 76 S. Ct. 373, 100 L. Ed. 373.

We consider, as did the Third Circuit in a similar case, Natural Gas Pipeline Company of America v. Federal Power Commission, filed February 26, 1957, (not yet reported), the contention of the Commission and Magnolia that petitioner is not aggrieved with Section 19 (b) of the Natural Gas Act most unrealistic. Petitioner has been compelled to pay eleven cents for its gas, and wrongfully so, because the Commission's acceptance of the rate schedule was pro forma the acceptance of the rate then being paid. To assert that petitioner's aggrievement lay with the invalid Kansas Corporation Commission order and not with the Power Commission's acceptance of Schedule 26 is but to play with words. Petitioner was twice aggrieved and has properly and consistently pursued separate remedies. And, since petitioner's complaint lies in the action of the Power Commission in accepting a rate schedule *which was not the effective rate on the critical date*, petitioner could not and need not pursue an administrative remedy under Section 5 of the Natural Gas Act to show that the accepted rate was unjust and unreasonable.

In view of the interpretation of the Natural Gas Act giving the Commission power to review rates set initially by contract, but providing no procedure by the contracting parties to either make or change rates, United Gas Pipe Line Co. v. Mobile Gas Service Corp., supra, petitioner should not bear the burden of convincing the Commission that rates which it never assented to and which were imposed upon it by an invalid order are unreasonable.

Additionally, Section 19 (b) provides that the court of appeals "shall have exclusive jurisdiction to affirm, modify, or set aside" the orders of the Commission. The power of a district court to grant reparation of amounts paid pursuant to an invalid order accepted as a current rate by the Commission is presently being questioned by a petition for certiorari of the case of Harrington v. Federal Power Commission (5 Cir.) 246 F. 2d 915. *Regardless of petitioner's right to pursue its remedies for the return of money paid prior to March 21, 1957, its rights to redress excess payments made subsequent to the Commission's action are further imperiled in a separate action by the existence of the outstanding Commission order.*

The question of whether or not petitioner has fully exhausted its administrative remedies is partially resolved by our determination that the order of the Commission was a final order and by petitioner's efforts to have the order changed by its protest and petition for rehearing. Petitioner was not obligated to undertake the burden of persuading the Commission to take action to invalidate the rate as unreasonable or detrimental to the public interest in accordance with Section 5.

That petitioner should have sought a declaratory order under Section 5 (d) of the Administrative Procedure Act, 5 U.S.C.A. 1004 (d) to terminate a controversy or remove an uncertainty is an argument obviously without merit. The position of the Commission was clearly announced and the petitioner's position was made known to the Com-

mission—there was no uncertainty which had not been resolved by the Commission's action on the petitions.

Finally, although *the Commission admits* the present invalidity of the Kansas order and offers to eventually expunge it from its records *as void ab initio*, the Intervenor insists that the legally effective rate for the period of time during which payments were made in accordance with the order was the eleven-cent rate. Magnolia, in accordance with the definition of "rate schedule" contained in the Commission's regulations, 18 C.F.R. 154.93, filed its contract and twenty-seven other supplementary documents "effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates and charges . . . ."

If the Kansas order *were valid*, there is no question but that despite the protests of the parties the contract would be altered by the order. Petitioner accepted this proposition by paying the ordered rate although it sought to have the order declared invalid. Having succeeded it is in no worse position than the consumer in United Gas Pipe Line Co. v. Mobile Gas Corp., supra, which was aggrieved by the filing of a unilaterally increased rate initiated by its producer. The Act recognizes the right of the parties to set rates by individual contract and abrogates none of the usual contract rights except for the reviewing powers

granted the Commission upon hearing. As was said in the Mobile case:

> "Our conclusion that the Natural Gas Act does not empower natural gas companies unilaterally to change their contracts fully promotes the purposes of the Act. By preserving the integrity of contracts it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. Conversion by consumers, particularly industrial users, to the use of natural gas may frequently require substantial investments which the consumer would be unwilling to make without long-term commitments from the distributor, and the distributor can hardly make such commitments if its supply contracts are subject to unilateral change by the natural gas company whenever its interests so dictate * * *. On the other hand, denying to natural gas companies the power unilaterally to change their contracts in no way impairs the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest. The Act thus affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other."

In the present case, as in the Mobile case, [no hearing has been held] to determine the propriety of the filed rate. When the United States Supreme Court struck down the Kansas order, *there was no longer a valid* order which could modify the contract rate, *and the contract rate was the rate effective on June 7, 1954*. See Natural Gas Pipeline Company of America v. Federal Power Commission, supra.

Intervenor, however, asserts that by their contract Magnolia and Cities Service agreed to abide by orders of any

regulatory body until such time as the same was held with finality to be invalid.

> "All of the provisions of the contract are subject to all legislation, State or Federal, with respect to the subject matter hereof, and to all present and future gas proration and other applicable orders, rules and regulations of duly constituted authorities having jurisdiction unless the same shall be declared or held, with finality, to be invalid or ineffective with respect thereto. * * *."

To so interpret the contract would require a strained and unnatural construction of the parties' intent and a substitution of the word "until" for "unless."

The Commission, in a supplemental memorandum, states by way of clarification of its brief in chief that it is not admitting that the contract rate is six cents per Mcf. This is a matter neither proper for our determination nor raised in the issues before us. Our duty is to merely set aside the order of the Commission accepting the filed rate and to direct the Commission to strike Supplement No. 26 from its files. Our authority is then exhausted. Cf. Sunray Mid-Continent Oil Co. v. F.P.C., 353 U. S. 944, 77 S. Ct. 792, 1 L. Ed. 2d 794.

It is so ordered.

## APPENDIX "B"

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

In the Matter of

Magnolia Petroleum Company

ORDER ACCEPTING RATE SCHEDULE FOR FILING

(Issued March 21, 1957)

Magnolia Petroleum Company (Magnolia) on February 19, 1957, retendered for filing as a rate schedule effective on June 7, 1954, for sales of natural gas to the Cities Service Gas Company (Cities Service), its basic contract dated June 17, 1946, together with various supplements or amendments thereto, which have been respectively designated as Magnolia's FPC Gas Rate Schedule No. 3, and Supplements Nos. 1 through 27 thereto. Magnolia proposes an effective date of January 14, 1957, for the retendered filing.

The Commission previously rejected a tendered filing of Magnolia for this sale as incomplete in that Magnolia did not submit a letter of January 21, 1954, from Cities Service conditioning the payments at the rate of 11¢ per Mcf upon the validity of the Kansas Corporation Commission Minimum Price Order and with expectation of a re-

fund from Magnolia if the order was invalid[1]. Magnolia has now included such letter of conditional payment. The retendered filing also includes three Kansas State Corporation Commission Orders setting a minimum price of 11¢ per Mcf at 14.65 psia for gas sold from the Hugoton Field.

Cities Service objects to the filing on the grounds that the Kansas Minimum Price Order is similar to the Oklahoma Minimum Price Order heretofore found by the courts to be invalid; that Magnolia should file a copy of the monthly payment check received from Cities Service showing the conditions under which the payment is made; and that Magnolia should not make any reservations in filing, inasmuch as acceptance of the check shows acceptance of the conditions of payment. Cities Service requests that any acceptance of the filing be conditioned as being without prejudice to the rights of Cities Service in pending litigation and the rate is effective only if the Kansas Minimum Price Orders are found to be valid.

*The Commission finds:*

Good cause has been shown that Magnolia's FPC Gas Rate Schedule No. 3, and Supplements Nos. 1 through 27 thereto, be accepted for filing; subject, however, to the express condition that such acceptance is without prejudice to any claims or contentions which have been made by or for Magnolia Petroleum Company or by or for Cities

[1]Cities Service is contesting the validity of the Kansas order in the courts.

Service Company in pending litigation concerning this particular sale of gas.

*The Commission orders:*

(A) Magnolia's FPC Gas Rate Schedule No. 3, and Supplements Nos. 1 through 27 thereto are accepted for filing; subject, however, to the express condition that such acceptance is without prejudice to any claims or contentions which have been made by or for Magnolia Petroleum Company or by or for Cities Service Company in pending litigation concerning this particular sale of gas.

(B) Nothing contained in this order shall be construed as a waiver of the requirements of Section 7 of the Natural Gas Act; nor shall it be construed as constituting approval by the Commission of any service, rate, charge, classification, or any rule, regulation, or practice affecting such service or rate provided for in the above-described rate schedule, nor shall this order be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate.

(C) This order is without prejudice to any findings or order which has been or may hereafter be made by this Commission in any proceeding now pending, or hereafter instituted by or against Magnolia Petroleum Company.

By the Commission.

/s/ J. H. GUTRIDE

Joseph H. Gutride,
*Secretary.*

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

In the Matter of

Magnolia Petroleum Company

ORDER MODIFYING ORDER ACCEPTING RATE SCHEDULE FOR FILING AND DENYING PETITIONS FOR REHEARING

(Issued May 17, 1957)

On April 18, 1957, Cities Service Gas Company (Cities Service) filed its application for rehearing of the Order Accepting Rate Schedule for Filing issued by the Commission on March 21, 1957. On April 19, 1957, Magnolia Petroleum Company (Magnolia) filed its application for rehearing in the same matter. The order in question accepted for filing Magnolia's FPC Gas Rate Schedule No. 3 with Supplements Nos. 1 through 27 thereto, for sales of natural gas to Cities Service.[1] Such Gas Rate Schedule and Supplements comprise a basic contract of June 17, 1946, between Magnolia and Cities Service and documents relating thereto, including three orders of the Kansas Corporation Commission (Supplements Nos. 18, 24 and 26), the latest of which established a minimum price of 11¢ per Mcf at 14.65 p.s.i.a. for the gas supplied by Magnolia.

[1] This filing constitutes Magnolia's June 7, 1954 rate schedule, see Regulations Under The Natural Gas Act, Sec. 154.91—154.102 inclusive, and is based on retender of a previous submission which did not include Supplement No. 27.

Upon further consideration of said rate schedule and the supplements thereto, and the above-mentioned applications for rehearing, the Commission *orders:*

(A) The aforesaid order issued on March 21, 1957, be and it is hereby modified as follows:

(i) The finding therein set forth is amended to read as follows:

> Good cause has been shown that Magnolia's FPC Gas Rate Schedule No. 3, and Supplements Nos. 1 through 27 thereto, be accepted for filing.

(ii) Paragraph "(A)" as therein set forth is amended to read as follows:

> Magnolia's FPC Gas Rate Schedule No. 3, and Supplements Nos. 1 through 27 thereto, are accepted for filing.

(B) Except to the particular extent they may be deemed to have been granted by this instant order, each of said applications for rehearing is denied.

(C) As hereby specifically modified or amended, said order issued March 21, 1957, shall remain and continue in full force and effect.

By the Commission: Commissioner Connole dissenting for the reasons set forth in his statements In the Matters of Dorchester Corporation, Docket No. G-6505, and Phillips Petroleum Company, Docket No. G-10908.

/s/ J. H. GUTRIDE

Joseph H. Gutride,
*Secretary.*

## APPENDIX "C"

[18 C.F.R., Chapt. I, Sections 154.92 and 154.93]

154.92 *Filing of Rate Schedules by Independent Producer*

(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission shall on or before December 1, 1954, file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. To each such rate schedule there shall be attached a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined.

(b) Every independent producer who, subsequent to the effective date of these rules, proposes to initiate an interstate transportation or sale of natural gas subject to the jurisdiction of the Commission to an existing or new customer shall file with the Commission not less than 30 days nor more than 90 days prior to the date such transportation or sale is proposed to be initiated a rate schedule, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale. To each such rate schedule there shall be attached a statement showing estimated sales and billing for the first month of service, in sufficient detail to show method of billing and prices used. The statement shall also give the proposed date of commencement of service. A

complete copy of all material shall be furnished to each purchaser under the rate schedule. With each such filing there shall be submitted a list of parties to whom such material has been mailed.

(c) Every independent producer who transports or sells less than 100,000 Mcf annually of natural gas subject to the jurisdiction of the Commission may, in lieu of the requirements of paragraphs (a) and (b) of this Section file a statement showing (1) the approximate annual volume involved, (2) the rate charged therefor, (3) the name of the purchaser, and (4) the geographical location (field, county, and State) at which delivery is made.

154.93 *Rate Schedule Defined*

For the purpose of Sections 154.92 through 154.101 hereof "Rate Schedule" shall mean the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges, applicable to the transportation of natural gas in interstate commerce or the sale of natural gas in interstate commerce for resale subject to the jurisdiction of the Commission.

## APPENDIX "D"

## UNITED STATES OF AMERICA
## FEDERAL POWER COMMISSION

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Docket No. R-168

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Nonacceptability of Rate Filings Based Upon State-Prescribed Minimum Prices

## NOTICE OF PROPOSED RULEMAKING

(April 28, 1958)

Notice is hereby given that the Commission has under consideration the issuance of a statement of general policy in the above-entitled matter.

On January 20, 1958, the Supreme Court, in *Cities Service Gas Co. v. State Corporation Commission of Kansas, 355 U. S. 391 (citing Phillips Petroleum Co. v. Wisconsin, 347 U. S. 672,* and *Natural Gas Pipeline Co. v. Panoma, 349 U. S. 44),* vacated a judgment of the Supreme Court of Kansas thereby holding, in effect, that the State of Kansas cannot lawfully fix a minimum price at the wellhead to be charged for, or attributed to, natural gas where such gas is sold in interstate commerce for resale, either at the wellhead or after production and gathering. A week later the Court, citing the *Cities Service* case, reversed the Oklahoma Supreme Court which had erroneously applied the

holding in the *Panoma* case, *supra*, to sales of residue gas only and not to sales at or near the wellhead. *Michigan Wisconsin Pipe Line Co. v. Corporation Commission of Oklahoma*, 355 U. S. 425.

It follows from the decisions in these cases that rate filings made pursuant to Section 4 of the Natural Gas Act and Part 154 of the Regulations under the Natural Gas Act may have no legal basis to the extent that such filings are predicated solely on State-prescribed prices of the nature described above.

Although, under Section 4 (a) of the Administrative Procedure Act, no general notice of proposed rulemaking is required where a statement of general policy is proposed to be issued, the Commission is cognizant of the importance of the decisions of the Supreme Court and any statement that it might issue in this regard. It, therefore, is taking this method of informing the public and interested parties that it is proposing to issue a statement substantially as follows as an amendment of its general rules, Part 2—General Policy and Interpretations, and possibly other statements or take other actions:

> § 2.56. *State-prescribed minimum prices for natural gas.* Since the Supreme Court has held, in effect, that States *cannot lawfully* fix a minimum price at the wellhead to be charged for, or attributed to, natural gas where such gas is sold in interstate commerce for resale, the Commission will reject any tender for filing pursuant to Section 4 of the Natural Gas Act which would initiate or change the price for the sale of natural gas in interstate commerce for resale to the extent that such filing is based upon a State-pre-

scribed or attributed minimum price. (E. g., Gas Price-Fixing Order of State Corporation Commission of Kansas, entered December 2, 1953 or the corresponding order of the Corporation Commission of Oklahoma.)

Among those questions which the Commission is considering in this connection which appear to be raised by the decisions of the Supreme Court referred to, are:

1. Whether any rate filing predicated solely upon a State minimum price order which has been declared invalid by the United States Supreme Court—

a. must now be regarded as having been invalid from the date of filing; or

b. must now be regarded as having become invalid upon the issuance on January 20, 1958 of the decision of the Supreme Court in *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U. S. 391, or on March 12, 1958, when the mandate of the Supreme Court was issued in that case; or

c. must now be regarded as having become invalid on the happening of some other event; or

d. must be regarded as still effective;

i. by reason of failure of the purchaser thereunder to protest the filing; or

ii. by reason of an agreement, expressed or implied, to pay the filed rate;

iii. by reason of legal estoppel against a protest by a purchaser thereunder; or

iv. for any other reason.

2. whether any of the above questions should be decided by the Commission by means of a general order or decided in individual cases after appropriate

proceedings, including hearings; or should be left for decision by an appropriate court in each individual situation;

3. in the absence of reparation power under the Natural Gas Act, whether the Commission can force any purchaser receiving refunds under an invalid rate as herein mentioned to pass such refunds on to its customers, and if not, whether the ultimate consumer would benefit from any refunds retained by the purchaser to whom paid by a producer hereunder.

The statement of general policy and the order herein described are proposed to be issued under the authority granted to the Federal Power Commission by Sections 4 and 16 of the Natural Gas Act (52 Stat. 822, 830; 15 U. S. C. 717c, 717o).

Any person may submit to the Federal Power Commission, Washington 25, D. C., not later than May 27, 1958, data, views, comments, and suggestions in writing concerning the proposed statement and order. An original and nine copies of any such submittal should be filed. The Commission will consider any such written submittals before acting on the proposed statement and order

/s/ J. H. GUTRIDE

Joseph H. Gutride,
*Secretary.*

## APPENDIX "E"

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any

manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the

use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over

other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U. S. C. §717c]

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

ADMINISTRATION POWERS OF COMMISSION; RULES, REGULATIONS, AND ORDERS

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U. S. C. § 717o]

REHEARING; COURT REVIEW OF ORDERS

SEC. 19 (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may

apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have the power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States[1] for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon

[1] Circuit Court of Appeals of the United States was redesignated as "United States Court of Appeals" by Act of June 25, 1948, 62 Stat. 870.

which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended. (U.S.C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [52 Stat. 831 (1938); 15 U. S. C. § 717r]

## APPENDIX "F"

### Judgment

Third Day, May Term, Wednesday, May 14th, 1958.

Before Honorable John C. Pickett, Honorable David T. Lewis and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the transcript of the record from the Federal Power Commission and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the Federal Power Commission accepting the filed rate be and the same is hereby set aside and the cause remanded to the Federal Power Commission with directions to strike Supplement No. 26 from its files.

LEE COPY

Office-Supreme Court, U.S.
FILED
SEP 15 1958
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 279

MAGNOLIA PETROLEUM COMPANY, *Petitioner*

v.

CITIES SERVICE GAS COMPANY, a corporation; and FEDERAL POWER COMMISSION, *Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF OF CITIES SERVICE GAS COMPANY IN OPPOSITION

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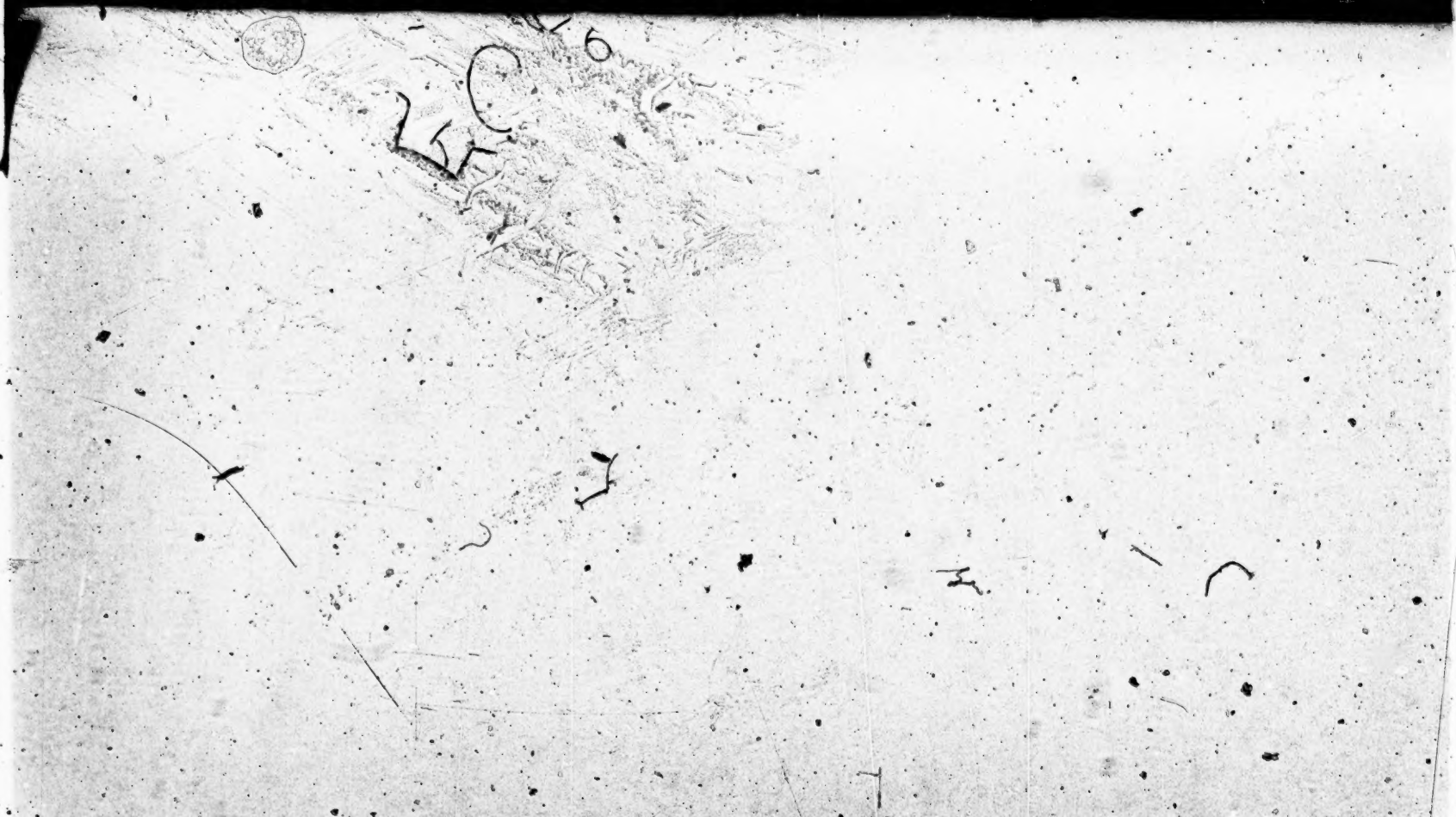

# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Statute Involved | 2 |
| Statement | 2 |
| 1. Background | 2 |
| 2. Commission Proceedings | 5 |
| 3. The Decision of the Court of Appeals | 7 |
| Argument | 8 |
| I. The Commission's Acceptance of Magnolia's Filing is Reviewable | 8 |
| II. The Kansas Minimum Price Order Was Properly Stricken from Magnolia's Rate Filing | 12 |
| Conclusion | 19 |
| Appendix | 21 |


## CITATIONS


| Cases: | |
|---|---|
| Court: | |
| Algonquin Gas Transmission Co. v. Federal Power Commission, 201 F. 2d 334 (1st Cir., 1953) | 9 |
| Atlantic Seaboard Corp. v. Federal Power Commission, 201 F. 2d 568 (4th Cir., 1953) | 9 |
| Chicago and Southern Air Lines v. Waterman Steamship Corp., 333 U.S. 103 (1948) | 9 |
| Cities Service Gas Co. v. Kansas Corporation Commission, 355 U.S. 391 (1958) | 2, 4, 12 |
| Cities Service Gas Co. v. Kansas Corporation Commission, 180 Kan. 454, 304 P. 2d 528 | 4 |

Page

Columbia Broadcasting System v. United States, 316 U.S. 407 (1942) ..... 9
Dorchester Corporation v. Natural Gas Pipeline Co., 357 U.S. 927 (1958) cert. den. 357 U.S. 926 (1958) ..... 13, 16
Frozen Food Express v. United States, 351 U.S. 40 (1956) ..... 9
Guss v. Utah L.R.B., 353 U.S. 1 (1957) ..... 14
Harrington v. Natural Gas Pipeline Co., 356 U.S. 957 (1958) ..... 13, 16
Isbrandtsen v. United States, 211 F. 2d 51 (C.A. D.C., 1954), cert. den., 347 U.S. 990 (1954) ... 8
Lee v. Federal Power Commission, 236 F. 2d 835 (5th Cir., 1956), cert. den. 352 U.S. 970 (1957) ..... 8, 11
Magnolia Petroleum Co. v. Federal Power Commission, 235 F. 2d 785 (5th Cir., 1956), cert. den. 352 U.S. 968 (1957) ..... 5
Montana-Dakota Utilities Co. v. Northwestern Public Service Commission, 341 U.S. 246 (1950) 19
Natural Gas Pipeline Co. v. Harrington, 246 F. 2d 915 (1957) cert. den., 356 U.S. 957 (1958) .... 15
Natural Gas Pipeline Co. v. Federal Power Commission, Dorchester Corp., 253 F. 2d 3 (1958) .. 15
Natural Gas Pipeline Co. v. Panoma Corp., 349 U.S. 44 (1955) ..... 4, 14, 16
Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954) ..... 5, 13, 14
Phillips Petroleum Co. v. Federal Power Commission, 227 F. 2d 470 (1955) cert. den. 350 U.S. 1005 (1956) ..... 8, 9
Shank v. Federal Power Commission, 236 F. 2d 830 (5th Cir., 1956), cert. den. 352 U.S. 970 (1957) ..... 9, 11, 12
United Gas Pipe Line Co. v. Mobile Gas Service Co., 350 U.S. 332 (1956) ..... 8, 19
United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) ..... 9

Page

STATUTE:

Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717, et seq. ..... 2
Section 7(b) ..... 11
Section 19(b) ..... 2, 8

MISCELLANEOUS:

Brief of Federal Power Commission, No. 5666 (10th Cir.) ..... 13
18 C.F.R. 154.92-93 ..... 5

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

---

## BRIEF OF CITIES SERVICE GAS COMPANY IN OPPOSITION

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### OPINION BELOW

The orders of the Federal Power Commission (R. 186-188, 200-201; Pet. App. B, 41-45) are not reported. The opinion of the Court of Appeals (Pet. App. A, 29-40) is reported at 255 F. 2d 860.

## JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1958 (Pet. App. F, 61). A petition for rehearing, timely filed (Trans. 130) was finally denied on July 15, 1958 (Supp. Trans. 2). The petition for a writ of certiorari was filed on August 16, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether orders of the Federal Power Commission, accepting, under Section 4(e) of the Natural Gas Act, the 11-cent minimum price order issued by the Kansas Corporation Commission (held invalid in *Cities Service Gas Co.* v. *Kansas Corporation Commission*, 355 U.S. 391), rather than the 6-cent price established in the contract between the parties as the effective rate as of June 7, 1954 for the sales of gas by Magnolia Petroleum Company to Cities Service Gas Company, constitute reviewable orders within the meaning of Section 19(b) of the Act.

2. Whether the Court of Appeals properly directed that the invalid minimum price order of the Kansas Corporation Commission be stricken from Magnolia's rate filing with the Federal Power Commission.

## STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717 *et seq.*, are set out in Petitioner's Appendix E, pp. 53-56, 57-60.

## STATEMENT

1. *Background.* (a) *The Magnolia Contract.* Cities Service Gas Company[1] is a natural-gas company en-

[1] Hereinafter referred to as "Gas Company."

gaged in the business of transporting and selling natural gas in interstate commerce at wholesale for resale and directly to industrial consumers in Oklahoma, Kansas, Nebraska and Missouri. On June 17, 1946, the Gas Company contracted to purchase from Magnolia Petroleum Company,[2] an independent producer, gas produced from approximately 100,000 acres of leaseholds in the Hugoton Field in Kansas (R. 19-41). The contract provides, *inter alia*, for a price of six cents per Mcf, measured on a pressure base of 16.4 pounds, for 15 years from the date of first delivery on December 13, 1948 (R. 26), and thereafter at a price to be agreed upon by the parties, or to be fixed by arbitration upon their inability to agree (R. 26). The contract was to be in effect for 20 years and, so long thereafter as gas is produced in commercial quantities (R. 38).

(b) *The Kansas Minimum Price Order and its Invalidation.* On December 2, 1953, the Kansas Corporation Commission, purporting to act in aid of its gas conservation powers, issued an order, effective January 1, 1954, prescribing a minimum price of 11 cents per Mcf, measured on a pressure base of 14.65 pounds, for all gas taken from the Kansas-Hugoton Field (R. 118-124). The Gas Company, prior to its issuance, had protested the order and, immediately after its issuance, brought suit in the District Court of Finney County, Kansas, to review and set aside the order. That court rejected the Gas Company's claim that the order sought to fix a price for gas sold for resale in interstate commerce in conflict with Section 1(b) of the Natural Gas Act, and upheld the order. On the Gas Company's appeal, the Kansas Supreme Court

[2] Hereinafter referred to as "Magnolia."

similarly held that the state minimum price order came within the excluding provisions of Section 1(b) and that the state order was, therefore, valid (*Cities Service Gas Co. v. Kansas Corp. Comm.*, 180 Kan. 454, 304 P. 2d 528). On January 18, 1957, the Gas Company appealed to this Court and on January 20, 1958, this Court reversed the judgment of the Kansas Supreme Court (355 U.S. 391).

(c) *Conditional Payments to Magnolia and the Gas Company's Declaratory Judgment Action.* Prior to making any payments to Magnolia for gas delivered after the effective date (January 1, 1954) of the Kansas order, the Gas Company advised Magnolia, by letter dated January 21, 1954, that it was contesting the validity of the order and that pending final determination thereof and in order to avoid statutory penalties, it would pay for all gas purchased by it from the Kansas-Hugoton field in compliance with that order, such payments, however, to be considered and accepted by Magnolia as involuntary and without prejudice to the Gas Company's rights in the pending litigation. The letter further advised that in the event the Kansas order was finally determined to be invalid, the Gas Company expected Magnolia to refund all overpayments (R. 131-132). Each monthly check issued to Magnolia thereafter until July 22, 1955 bore the endorsement that the payment was made subject to the conditions of the January 21, 1954 letter (R. 86). Magnolia cashed each of these checks without any reservations.

Subsequently, however, the parties disagreed as to the impact on the Kansas order of the invalidation of the Oklahoma minimum price order in *Natural Gas Pipeline Co. v. Panoma Corp.*, 349 U.S. 44 (April 11,

1955) and Magnolia threatened to regard the contract as breached unless the Gas Company paid the 11-cent price fixed by the Kansas order. Accordingly, the Gas Company, on November 30, 1955, instituted an action against Magnolia in the United States District Court for the District of Kansas, seeking declaratory judgment that the Kansas minimum price order was void and praying for judgment against Magnolia for the overpayments made under the compulsion thereof (R. 153-168, 176). As ordered by the District Court, the Gas Company has, since that time, paid into court the moneys representing payments for gas received from Magnolia since July 23, 1955 at the 11-cent state ordered price. By agreement of the parties the court also directed the payment over to Magnolia of the six-cent contract price and the impounding of the difference in the registry of the court.

2. *Commission Proceedings.* Following this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, on June 7, 1954, the Federal Power Commission,[3] on July 16, 1954, issued its Order 174. As amended by Order 174-A on August 6, 1954, and by Order 174-B on December 17, 1954, this Order, among other things, required each "independent producer" of natural gas to file with the Commission its rate schedules "effective on June 7, 1954."[4] Having been unsuccessful in its challenge to the validity of these orders (see *Magnolia Petroleum Co.* v. *FPC*, 235 F. 2d

[3] Hereinafter referred to as "Commission."

[4] The orders define rate schedule as "the basic contract and all supplements or agreements amendatory thereof effective and applicable on and after June 7, 1954, showing the service to be provided and the rates and charges, terms, conditions, classifications, practices, rules and regulations affecting or relating to such rates or charges * * *." 18 C.F.R. 154.92-93.

785 (5th Cir., 1956), *cert. den.*, 352 U.S. 968 (1957). Magnolia, on January 19, 1957, tendered to the Commission for filing as a rate schedule a copy of the Kansas minimum price order together with its contract with the Gas Company (R. 118-124). In accordance with the Gas Company's protest (R. 141-148), *inter alia*, that the aforementioned January 21, 1954 letter had been improperly omitted from Magnolia's filing, the Commission, on February 15, 1957, rejected the filing without prejudice to its re-tender if copies of the January 21, 1954 letters were added, or alternatively, if the Kansas price order were eliminated from the filing (R. 176-177).

Magnolia re-tendered its proposed filing, together with a copy of the letter of January 21, 1954, on February 19, 1957 (R. 177-178). The Gas Company again protested its acceptance on the grounds, also urged in its protest to the original filing (R. 141-148), that the Kansas minimum price order was void *ab initio*, and consequently, since it could not change the six cent contract price, it was not properly a part of Magnolia's effective price on June 7, 1954 (R. 179-185). The Gas Company also urged that if the Commission did accept the re-tendered filing, it should expressly be made conditional and without prejudice to the Gas Company's rights against Magnolia in the pending court litigation (R. 185). By order issued March 31, 1957, the Commission accepted Magnolia's re-tendered filing "* * * subject, however, to the express condition that such acceptance is without prejudice to any claims or contentions which have been made by or for Magnolia Petroleum Company or by or for Cities Service Gas Company in pending litigation concerning this particular sale of gas." (R. 186-188).

On March 25, 1957, Magnolia wired the Gas Company (R. 198):

> "THIS IS TO ADVISE YOU THAT THE FPC HAS ACCEPTED AS MAGNOLIA'S EFFECTIVE RATE ITS RATE FILING OF 11c PER MCF. THIS IS A DEMAND UPON YOU TO MAKE PAYMENT AT THIS EFFECTIVE FILED RATE DIRECT TO MAGNOLIA PETROLEUM COMPANY. NO FURTHER DEPOSITS ARE TO BE MADE IN THE FEDERAL COURT AT WICHITA, KANSAS. ALL PAYMENTS INTO THE REGISTRY OF THE COURT TO DATE SHOULD NOW BE TURNED OVER TO MAGNOLIA PETROLEUM COMPANY."

Since the Gas Company construed the Commission's March 21, 1957 order as meaning that if the Kansas minimum price order is held invalid, Magnolia's legally effective rate is the six-cent contract price, otherwise, the 11-cent Kansas minimum price, the Gas Company rejected Magnolia's demand (R. 199-200), and applied to the Commission for rehearing and clarification (R. 188-195). Magnolia likewise filed an application for rehearing and clarification (R. 195-198). By order issued May 17, 1957, the Commission eliminated the "without prejudice" provision from its March 21 order (R. 200-201).[5]

3. *The Decision of the Court of Appeals.* On the Gas Company's petition for review, the Court of Appeals set aside the Commission's order accepting the

[5] Considering the May 17 order as in effect a new order, the Gas Company filed an Application for Rehearing. The Commission, however, rejected this Application for the stated reason that "There is no provision under the Natural Gas Act nor in the Commission's rules for applications for rehearing of orders denying rehearing" (R. 11). This Application for Rehearing also reiterated the various objections previously raised in the Gas Company's protest.

11-cent rate and remanded the case to the Commission with directions to strike the Kansas minimum price order from Magnolia's filing (Pet. App. A, 39).[6] In so concluding, the court below, relying on its earlier decision in *Phillips Petroleum Co.* v. *FPC*, 227 F. 2d 470 (1955), *cert. den.*, 350 U.S. 1005 (1956), held that the Commission's order was reviewable, since it purported to establish with finality the rate which Magnolia was authorized to charge the Gas Company on June 7, 1954 (Pet. App. A, 33-35). On the merits, the Court of Appeals, quoting at length from *United Gas Pipe Line Co.* v. *Mobile Gas Service Co.*, 350 U.S. 332 (1956), to the effect that the Act does not grant to a party to a contract the right unilaterally to change the contract rate, ruled that although the Kansas order, if valid, would have been effective to alter Magnolia's contract with the Gas Company, "[w]hen the United States Supreme Court struck down the Kansas order, there was no longer a valid order which could modify the contract rate, and the contract rate was the rate effective on June 7, 1954" (Pet. App. A, 38).

## ARGUMENT

### I. THE COMMISSION'S ACCEPTANCE OF MAGNOLIA'S FILING IS REVIEWABLE

The Court of Appeals properly, we submit, held that the Commission's orders accepting Magnolia's rate filing constitute reviewable orders within the meaning of Section 19(b) of the Natural Gas Act. Contrary to Magnolia's contention (Pet. pp. 9-11), this ruling does not conflict with *Lee* v. *FPC*, 236 F. 2d 835 (5th

[6] The emphasis appearing in this language as it is set out in the Appendix to the petition, apparently has been supplied by Magnolia. It does not appear in the original opinion as issued by the court below.

Cir., 1956), *cert. den.*, 352 U.S. 970 (1957), or with *Shank* v. *FPC*, 236 F. 2d 830 (5th Cir., 1956), *cert. den.*, 352 U.S. 970 (1957).

A. The criteria for ascertaining the renewability of administrative orders are well established. "The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequence to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control." *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 425 (1942).[7] "Thus, administrative orders are ordinarily reviewable when 'they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process.' Under this test a final order need not necessarily be the very last order." *Isbrandtsen* v. *United States*, 211 F. 2d 51, 55 (C.A.D.C., 1954), *cert. den.*, 347 U.S. 990 (1954) and cases there cited.[8] As summarized by the court below in its earlier decision in *Phillips Petroleum Co.* v. *FPC*, 227 F. 2d 470, 474-475 (1955), *cert. den.*, 350 U.S. 1005 (1956):

> "* * * reviewability extends to an order issued by the Commission which finally determines the legal rights of the parties with respect to matters within the scope of review."

[7] See, also, *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956).

[8] See, also, *Atlantic Seaboard Corp.* v. *FPC*, 201 F. 2d 568, 572 (4th Cir., 1953); *Algonquin Gas Transmission Co.* v. *FPC*, 201 F. 2d 334, (1st Cir., 1953); *cf. Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103, 110 (1948).

The Commission's orders here are clearly reviewable under these standards, for, far from being merely procedural steps taken at the inception of an administrative process, as claimed by Magnolia (Pet., p. 8), the orders here involved are final orders accepting for filing a tendered rate schedule which is to remain in effect until changed in an entirely new and separate proceeding. Those orders not only purport to fix the rate (at about double the contract price) which the Gas Company is to pay Magnolia for an indefinite period into the future, but also operate to make this rate retroactive to June 7, 1954. Thus, the orders adjudicate with finality "an effective rate at June 7, 1954." So far as this particular administrative proceeding is concerned, there are no issues left to be decided, no further hearings to be had and no further orders to be made. In a word, the administrative processes are at an end.[9]

Moreover, contrary to its claims here, Magnolia itself has recognized and treated these orders as final. It was on the basis of these orders that Magnolia demanded of the Gas Company that it "make payments at this effective filed rate direct to Magnolia Petroleum Company. No further deposits are to be made in the Federal Court at Wichita. All payments into the Registry of the Court to date should now be turned over to Magnolia." (R. 198). And when the Gas Company declined to yield to this demand, Magnolia

[9] The dollar impact of these orders is indicated by the billing statement which Magnolia submitted as part of its filing (R. 133-139). This statement shows that for the single gas billing month May 23 through June 22, 1954, Magnolia delivered 1,040,315 Mcf of gas (14.65 psia). The difference between the 11-cent price accepted by the Commission and the 6-cent contract price on this volume of gas for this one month is $59,249.29.

sought summary judgment in the declaratory judgment action pending in the federal District Court (Trans. 74). It there contended that the Commission's orders established 11 cents as Magnolia's effective rate on and after June 7, 1954, and hence that Magnolia is entitled as a matter of law to the moneys representing the excess over the 6-cent rate, which had been deposited in the registry of the court. These actions leave no doubt that Magnolia also is fully alert to the finality and legal consequences attaching to these orders of the Commission.

B. The holding below does not conflict with the *Lee* and *Shank* cases. The Fifth Circuit's rulings, that the Commission's orders there involved were not reviewable, were based on the wholly different facts of these cases, not on a different view of the applicable legal standards. Both of these cases involved situations where independent producers had sought to withdraw, prior to any Commission action thereon, certificate applications and initial rate schedules for sales made by them on June 7, 1954, in order to discontinue those sales and thereby enable them to sell the gas to another company at a higher price.

Since the discontinuance of the original sales constituted abandonment of service, which, under Section 7(b) of the Natural Gas Act,[10] was permissible only

[10] Section 7(b) provides:

"No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

with Commission approval given after hearing and requisite findings, the Commission refused to permit these attempted withdrawals without the required hearings. Before the Commission could hold these hearings, the producers filed petitions for review. It was in these circumstances that the Fifth Circuit held (236 F. 2d at 834):

> "* * * we think it plain that these orders are in no proper sense definitive as contemplated by Section 19(b), but they are instead mere procedural steps taken at the inception of and not upon the completion of the administrative process. All that the Commission did in the exercise of its regulatory jurisdiction was to enter preliminary, interlocutory orders which do not bear upon the merits of the controverted fundamental issues which must ultimately be adjudicated by the Commission."

These basic differences of fact fully justified the different results without thereby creating a conflict in decisions.

## II. THE KANSAS MINIMUM PRICE ORDER WAS PROPERLY STRICKEN FROM MAGNOLIA'S RATE FILING

In urging that the court below improperly directed the striking of the Kansas minimum price order from its rate filing, Magnolia claims primarily that the Kansas order was not void *ab initio*, but rather was inoperative only from July 16, 1954, when the Commission first undertook to exercise its jurisdiction over independent producers. Consequently, argues Magnolia, the order was a valid part of Magnolia's effective rate as of June 7, 1954, the critical date under the Commission's 174 series of orders. (Pet., pp. 16-26). Not only is the conclusion of the court below fully supported by *Cities Service Gas Co.* v. *Kansas Corporation*

*Commission*, 355 U.S. 391 (1958), but this Court already has twice declined to review this contention by denying *certiorari* in *Dorchester Corp.* v. *Natural Gas Pipeline Co.*, 357 U.S. 927 (1958), and in *Harrington* v. *Natural Gas Pipeline Co.*, 356 U.S. 957 (1958).

Magnolia's subsidiary contentions are equally without substance. Magnolia's assertion that the decision below will cause the Commission's established regulatory procedures to crumble (Pet., p. 16) apparently does not reflect the Commission's views. The Commission has not sought *certiorari*. The Commission apparently is adhering to its position in the court below where it conceded in its brief (at pp. 6-7):

> "* * * although the Magnolia rate was 'effective' at the time it was filed because it then was the only legal rate governing the sale, it must now be recognized that the actual rate and the legal rate during the period was the 6c contract rate. This follows not only from the fact that the sale contract embodied the Kansas order only if it was valid (R. 39) and the contract rate governs unless modified by the parties, but more importantly because the order in contemplation of law was a nullity and hence the only rate which could have been in effect during this period was the rate provided by the contract which was incorporated in Magnolia's rate schedule."

See also, Brief for the Federal Power Commission before the court below (No. 5666), at pp. 7, 9, 11.

A. This Court plainly ruled in the *Cities Service* case, *supra*, that the Kansas minimum price order was invalid from its inception. While the *per curiam* opinion merely states that the judgment of the Kansas Supreme Court is reversed, the opinion cites, as authority therefor, *Phillips Petroleum Co.* v. *Wisconsin*, 347

U.S. 672 (1954) and *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U.S. 44 (1955). *Phillips* involved purely a question as to the scope of the Natural Gas Act, *i.e.*, its applicability to sales by independent gas producers. There was no question as to Commission exercise of jurisdiction and, indeed, the Commission had until then regarded itself as without jurisdiction. The Court's reliance upon *Phillips* in these circumstances strongly indicates that it held the Kansas order invalid because the Congressional enactment of the Gas Act had fully pre-empted the field and left no area for state action. Since the principle upholding the validity of state action where "federal power has been delegated but lies dormant and unexercised," invoked by Magnolia (Pet., pp. 19-22), ultimately depends upon Congressional intent, it, accordingly, is inapplicable here. See *Guss* v. *Utah L.R.B.*, 353 U.S. 1, 9-10 (1957), and cases there cited.

The citation of *Panoma* makes this pre-emption even more clear. There, this Court had also held invalid a state (Oklahoma) minimum price order on the authority of *Phillips*. In addition, the *per curiam* opinion in that case noted:

> "Mr. Justice Douglas, being of the opinion that state regulation is permissible until Federal price regulation permitted by *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, is imposed, dissents."

By thus dissenting, Mr. Justice Douglas makes it clear that the Court had considered and rejected limited pre-emption such as Magnolia urges here and had concluded instead that the Oklahoma order was invalid from its inception. In these circumstances, the citation of *Panoma* in *Cities Service* could only mean that the Kansas order was similarly void *ab initio*.

The Courts of Appeals which have considered the matter have construed *Panoma* as so holding. In *Natural Gas Pipeline Co.* v. *FPC, Dorchester Corp.*, 253 F. 2d 3 (1958), the Commission, as here, had accepted the Oklahoma price order (invalidated in *Panoma*) as part of a producer's effective rate as of June 7, 1954. The Third Circuit, as the court below did here, set aside the Commission's action, stating (253 F. 2d at 7):

> "* * * When the United States Supreme Court found Oklahoma's action to have been unlawful and set the state commission's order aside, there was no longer even the semblance of a valid law, or lawful order which could modify the contract rate. The contract rate, therefore, under the mandate of the Supreme Court must be held to have been the rate effective on June 7, 1954."

And the Third Circuit, "after due consideration," denied the producer's petition for rehearing based explicitly on the ground that *Panoma* had invalidated the Oklahoma order only from July 16, 1954 when the Commission issued Order 174.[11]

Likewise, in *Natural Gas Pipeline Co.* v. *Harrington*, 246 F. 2d 915 (1957), the Fifth Circuit, in affirming

[11] Dorchester's petition for rehearing asserted (at p. 4):

> "This court evidently assumed that the Oklahoma minimum price order was void *ab initio*. The Supreme Court, however, did not say when the Oklahoma minimum price order became invalid. This point was not decided by the Supreme Court in *Natural Gas Pipeline Co. of America* v. *Panoma Corporation*. In *Panoma* the court made no determination as to whether such state regulation was valid or invalid prior to the implementation of the regulation of the independent producers by the Federal Power Commission, which did not occur until promulgation by the Commission of Order 174 on July 16, 1954."

the District Court's grant of restitution of the excess over the contract rate paid under compulsion of the Oklahoma minimum price order, ruled that the invalidity of that order "was not caused by any defect or imperfection of form or slip of procedure but resulted from a total lack of jurisdiction," 246 F. 2d at page 918. When the producer's second petition for rehearing claimed that the Oklahoma order was valid until the Commission promulgated Order 174, the Fifth Circuit, in a supplemental opinion (253 F. 2d 231), rejected the contention, citing, among others, *Panoma* and *Cities Service*.

Petitions for certiorari pressing the producers' reading of *Panoma*, substantially in *haec verba* with Magnolia's claim here, were filed in both *Harrington* and *Dorchester* (see Petition in No. 901, Oct. Term, 1957, at pp. 2-3, 7-12; Petition in No. 1003, Oct. Term, 1957, at pp. 2, 9-15) and this Court denied *certiorari*, 356 U.S. 957 (1958), 357 U.S. 926 (1958).

Finally, it is to be noted that when the mandate of this Court in the *Cities Service* case (355 U.S. 391) reached the District Court of Finney County, Kansas (the trial court in that case), that court, by Journal Entry, dated May 5, 1958, found that the State Corporation Commission of Kansas "was without jurisdiction" to enter the minimum price order and ordered that "the same is hereby set aside" (See Appendix, *infra*, pp. 21-23).[12]

B. Magnolia's additional contentions do not in any way impair the soundness of the judgment of the court below.

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[12] The Kansas Commission has appealed the judgment represented by the Journal Entry to the Kansas Supreme Court on the principal ground that the minimum price order should have been set aside only from and after July 16, 1954.

1. The arguments, that the decision below is in derogation of vested rights (Pet., pp. 23-24), and further, that it deprives Magnolia of its opportunity to support the filing on the basis of voluntary payment, acquiescence or estoppel (Pet., pp. 11-14, see also, pp. 14-16), ignore the critical facts that from the time the Kansas order was first issued, the Gas Company had taken all appropriate steps looking toward the order's invalidation and had made known its intention on numerous occasions to insist upon its contract rights when its position was vindicated.

Thus; the Gas Company sought judicial review of the Kansas order and brought the case to this Court. *Supra*, pp. 3-4. In addition, on January 21, 1954, shortly after the Kansas order was issued and before any further payments were due under the contract, the Gas Company advised Magnolia that while it would pay at the 11-cent rate, these payments were involuntary and without acquiescence in the order's validity and that it expected refunds of the excess when the order was finally invalidated. Each payment thereafter made was expressly subject to this letter. *Supra*, pp. 4. Also, in 1953 the Gas Company brought its action in the Kansas Federal District Court seeking a declaratory judgment that the Kansas order was invalid and judgment for overpayments made under compulsion of that order. Since that time Magnolia has received payment only at the 6-cent contract rate, the excess over that amount paid by the Gas Company being retained in the registry of that court to be disbursed in accordance with the final decision in that proceeding. *Supra*, pp. 5. Finally, when Magnolia tendered its rate filing to the Commission, the Gas Company opposed the filing on the basis of the invalidity of the

order, and instituted the present review proceeding upon the Commission's acceptance of the filing as retendered by Magnolia. These various actions by the Gas Company plainly precluded Magnolia from acquiring any vested rights in the 11-cent rate and effectively destroyed any possible basis for a claim to that rate by Magnolia on the grounds of voluntary payment, acquiescence or estoppel. And even assuming *arguendo* that such grounds can be asserted against a regulated company, the fact is that at no time did Magnolia assert such grounds in justification of the 11-cent rate. Their injection at this point, we submit, borders on the frivolous, particularly in view of the recognition in their main brief to the court below (p. 24) that "Cities Service was making payment under protest, * * *."

2. The contention that the judgment below is improperly based upon events occurring after the Commission issued its order (Pet., pp. 6, 7, 8), is based on a wholly erroneous premise. Since the basic issue raised by the Gas Company was the invalidity of the Kansas order, the alleged supervening event, *i.e.*, this Court's decision holding the Kansas order invalid, operated to settle the law for all purposes, including this proceeding.

3. Finally, the claim that the decision below conflicts with the filed rate doctrine (Pet., pp. 24-26), misconceives that principle. There is nothing in that doctrine which bars a timely attack upon the propriety of a rate filing made, as it was here, in the very proceeding in which the Commission is considering its acceptance. Moreover, Magnolia would accord the mere act of filing an unassailable sanctity. This, obviously, is not the legal fact. Rates specifically agreed upon by contract, as here, cannot be unilaterally changed. *United Gas*

*Pipe Line Co. v. Mobile Gas Service Corporation*, 350 U.S. 332 (1956). Nor are the *Montana-Dakota* and other cases cited by Magnolia (Pet., pp. 25-26) in point. Simply stated, Magnolia, in the instant case, attempted to obtain a price for its gas almost twice that agreed upon by contract. It relied on a void state minimum price order as a vehicle to accomplish that objective. Its "right" to the 11-cent rate is no better than the vehicle by which it sought to obtain such rate. When this Court declared the Kansas minimum price order void, Magnolia's asserted "right" vanished. Indeed, Magnolia's arguments all have a hollow ring when viewed in the light of the aforementioned letter of January 21, 1954.

## CONCLUSION

The judgment of the Court of Appeals is clearly correct and there is no conflict of decisions. The petition for a writ of certiorari, accordingly, should be denied.

Respectfully submitted,

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September , 1958.

## APPENDIX

IN THE DISTRICT COURT OF FINNEY COUNTY, KANSAS

No. 9934

CITIES SERVICE GAS COMPANY, a Corporation, *Plaintiff*,

vs.

STATE CORPORATION COMMISSION OF KANSAS, MARION BEATTY, CHAIRMAN, RICHARD C. BYRD and HARRY G. WILES, AS MEMBERS OF SAID COMMISSION, AND THEIR RESPECTIVE SUCCESSORS IN OFFICE,

*Defendants*.

### Journal Entry

Now on this 5th day of May, 1958, the above entitled cause came on for hearing on the several motions of Plaintiff and Defendants, relative to the judgment to be entered by this Court pursuant to the Mandate of the Supreme Court of the State of Kansas and the Mandate of the United States Supreme Court heretofore issued in the above entitled cause. The Plaintiff appeared by its counsel O. R. Stites, Joe Rolston, M. F. Cosgrove, Mark H. Adams and D. B. Lang. The Defendants appeared by their counsel Clyde Milligan, Wayne Coulson and Dale M. Stucky.

Thereupon, counsel for Plaintiff and Defendants, having filed their respective briefs with the Court, orally argued the matter to the Court, and the Court after having heard said arguments, took the matter under advisement.

Now on this 12th day of May, 1958, the above entitled matter comes on for decision, and the Court having considered the briefs of counsel for the respective

parties and the oral arguments, and being fully advised in the premises, finds:

That in compliance with the Mandate of the Supreme Court of the State of Kansas, and the Mandate of the United States Supreme Court and its *per curiam* opinion, the judgment of this Court entered in this proceeding on the 14th day of May, 1956, be and the same should be vacated and set aside.

The Court further finds that the State Corporation Commission of the State of Kansas was without jurisdiction to enter its order in its Docket No. 44,079-C (C-3216) Conservation Division, dated December 2, 1953, same being the subject of review in this proceeding, and that said Order of said State Corporation Commission should be by this Court set aside, and that the costs of this proceeding should be taxed against the State Corporation Commission, defendant herein.

WHEREFORE, it is Considered, Ordered, Adjudged and Decreed by the Court:

1. That the judgment of this Court heretofore entered on the 14th day of May, 1956, in the above proceeding, be and the same is hereby vacated and set aside.

2. That the Order of the State Corporation Commission of the State of Kansas, entered December 2, 1953, in its Docket No. 44,079-C (C-3216), Conservation Division, be and the same is hereby set aside.

3. That the costs of this proceeding in the amount of $..... be and the same are hereby taxed against the State Corporation Commission of Kansas.

(Signed) ROLAND H. TATE
*District Judge*

/s/ CONRAD C. MOUNT
O. R. STITES
JOE ROLSTON
M. F. COSGROVE
MARK H. ADAMS
D. B. LANG

*Attorneys for Plaintiff*

APPROVED AS TO FORM:

s CLYDE MILLIGAN
FRANK G. THEIS
WAYNE COULSON

*Attorneys for Defendants*